IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 319

FIDELITY ASSURANCE ASSOCIATION, a corporation, Debtor, and CENTRAL TRUST COMPANY, Trustee for Fidelity Assurance Association,

Petitioners,

vs.

EDGAR B. SIMS, Auditor of the State of West Virginia, and Ex Officio Insurance Commissioner of the State of West Virginia; ROSS B. THOMAS and H. ISAIAH SMITH, West Virginia State Court Receivers; BANKING COMMISSION OF WISCONSIN; CHAS. R. FISCHER, Commissioner of Insurance and Permanent Receiver for debtor corporation in and for the State of Iowa; JOHN B. GONTRUM, Insurance Commissioner of the State of Maryland; DEWEY S. GODFREY, Missouri State Court Receiver; L. H. BROOKS, Trustee, FREDERIC LEAKE and A. L. GOLDBERG, JR., Trustee; and SECURITIES AND EXCHANGE COMMISSION,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONERS

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OPINIONS BELOW

The opinion of the District Court is a part of the record (176), and is reported in 42 F. Supp. 973.

The opinion of the Circuit Court of Appeals, Fourth Circuit, is a part of the record (238) and is reported in 129 F. (2d) 442.

JURISDICTION

The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347), and Sections 24(c) and 121, as added June 22, 1938, of the Bankruptcy Act (11 USCA 47(c) and 521).

STATUTES INVOLVED

Federal Statutes

The issues involve the construction and application to the facts of this case of the Bankruptcy Act, particularly Section 4 of Chapter III as amended (11 USCA 22) and Sections 106(3), 144, and 146 of Chapter X (11 USCA 506(3), 544 and 546), and of the Investment Company Act of 1940, Title I, particularly Sections 2(a)(15) and (17), 3(a)(2), 3(c)(3), 3(c)(6), 4(1), 6(a)2, 25, 28, 53 (15 USCA 80(a) with the same sections and subsections except that Section 53 of the Act is Section 52 in USCA) and Section 29(a) and (b) (11 USCA 107(f), 72 (a)).

Such pertinent provisions of these statutes as are not presented in the Argument are printed in the Appendix to this brief.

West Virginia Statutes

The issues also involve a consideration of the following West Virginia statutes:

Chapter 33 of the Code of West Virginia (West Virginia Code of 1937, Annotated, Michie):

Article 9, Sections 1 to 12, inclusive;

Article 2, Sections 5, 12 and 45;

Article 3, Sections 1 and 7.

Chapter 46, Acts of the Legislature of West Virginia, 1941 (1941 Cumulative Supplement to the West Virginia Code of 1937, Michie, Chapter 32, Article 3; Chapter 33, Article 9).

Such pertinent provisions of these statutes as are not presented in the Argument are printed in the Appendix to this brief.

Statutes of Other States

A table of statutes of other states comparable to Section 3 of Article 9 of Chapter 33 of the Code of West Virginia relating to the deposits required to be made with state officials by companies such as Fidelity is found on page 24 of the Transcript of Record.

Numbers in parentheses refer to pages of Transcript of Record unless otherwise indicated. Exhibits will be referred to by the abbreviation "Ex.", followed by the appropriate number or letter. Fidelity Assurance Association will usually be referred to as "Fidelity". The United States District Court for the Southern District of West Virginia will be referred to as the "District Court". The United States Circuit Court of Appeals for the Fourth Circuit will be referred to as the "Circuit Court". The proceeding in the Circuit Court of Kanawha County, West Virginia, will ordinarily be referred to as the "State Court proceeding", and said court will be referred to as the "State Court". There being proceedings in state courts of twelve different states, the context will show when reference to the state court proceedings comprises proceedings in more than one state court. Edgar B. Sims,

Auditor of the State of West Virginia and Ex Officio Insurance Commissioner, will frequently be referred to as the "State Auditor". Ross B. Thomas and H. Isaiah Smith, Receivers appointed by the Circuit Court of Kanawha County, West Virginia, will frequently be referred to as the "State Court Receivers" though that phrase may at times comprise receivers appointed in other states as well. Unless otherwise indicated, the "respondents" will refer to the respondents other than the Securities and Exchange Commission.

STATEMENT OF THE CASE

The material facts are presented in some detail in the opinion of the District Court (176) and in the opinion of the Circuit Court of Appeals (238). Condensed for the purposes of this brief, the facts of the case and the nature of the proceeding are as follows.

Nature of the Proceeding

This proceeding arises under Chapter X of the Bankruptcy Act and was instituted by the filing of a voluntary petition for reorganization by Fidelity (4).

Organization and Business of Fidelity

Fidelity was incorporated under the laws of the State of West Virginia, on April 11, 1911, under the name of Fidelity Investment and Loan Association and was authorized by its charter to buy, sell, and deal in stocks, bonds, and real estate. Fidelity's charter was amended in November, 1912, and its name was changed to Fidelity Investment Association. By the amended charter it was authorized to receive payments on annuity contracts in fixed installments or otherwise and to sell certificates, bonds, or other investment securities of any kind on installment or any other plan of payment (240; Ex. 20;

398). A copy of the charter powers of this charter is, for convenience, printed in the Appendix.

Under these charter powers from November, 1912, until December 31, 1940, Fidelity was engaged in selling its own securities in the form of investment contracts variously known as annuities, income contracts, or, more recently, face-amount installment certificates, and in investing the funds received from the purchaser (378). This activity brought Fidelity within the scope of Article 9, entitled Annuity Contracts, of Chapter 33, entitled Insurance and Annuity Contracts, of the Code of West Virginia requiring a license from the State Auditor, and by the provisions of Section 3 of said Article 9 (Appendix) the company was required to deposit securities with the State Treasurer as therein provided (178; 294-295; 365-366). Deposits in lesser amounts were also made with the statutory officials of some fourteen other states pursuant to the respective statutes, of the same general character as the West Virginia statute, of those States (Ex. C with Trustee's Report No. 2; 85; 347; 348). Insurance companies are expressly excluded from the provisions of the said Article 9 of Chapter 33 by Section 1 thereof (Appendix). Fidelity did business in fourteen other states which required no such deposits (348). A table of the deposits by states, as of the date of the filing of the petition in this proceeding, is found in the Opinion of the Circuit Court (242; Ex. 48), from which it will be noted that the deposits in West Virginia are substantially in excess of the liabilities to West Virginia creditors.

In the various states the activities of Fidelity were regulated by various officials or departments: in some, the securities department; in some, the banking department; and, in others, the insurance department (12-13; 348-373).

While the various types of investment contracts sold by Fidelity differ in some respects, they are all alike in providing for monthly, semi-annual or annual payments of specified sums, of which a sufficient portion was to be set aside in a reserve fund which was to produce the sum required to pay the purchaser the amount of money agreed upon in the contract (Ex's. 1, 2, 3, 4, 5; 305-316). The earlier contracts contained no statement as to the basis of the reserve fund. Of the later contracts, some provided for reserves on a 4½% basis and some on a 4% basis. All provided that the reserve fund so set aside should "be invested in approved securities and deposited in trust as required by the laws of the State of West Virginia" (179). In each of the contracts there was a provision whereby, with slight variation in language as to each particular class or series of contracts, Fidelity agreed to create and maintain a reserve fund for such particular class or series from payments made on contracts of that particular class or series, which reserve fund was to be used for the discharge of its liabilities on that particular class or series of contracts; and on its books Fidelity kept these various series funds separate and distinct (180; 319; 331; 376; 380; Ex. 25). Some of these series funds, the later and larger ones, are solvent (Ex. 70, 751; 492-493; 632-633; Ex. 21, 398; 1215). As a whole Fidelity is about 90% solvent (196; 242). There are approximately 88,000 contract holders, whose individual claims are relatively small (242; 479; Ex's. J and L with Trustee's Report No. 2, 86-87; Ex. 34, 515).

About 1934 Fidelity issued a contract known as the "Income Reserve Contract Series B", commonly referred to as the "Series B Contract" (Ex. 4, 315), the sale of which from that time on until December 31, 1940, constituted the major portion of its business (312; 315; 680).

The Series B Contracts contained the following provision:

> "SECTION 1. Reserve Fund. The Association shall create and maintain a Reserve Fund, as a Special Fund, solely for the discharge of its liability upon its Income Reserve Contracts Series B and its paid-up contracts issued in lieu thereof. * * *"

The Series B Contracts also contained an optional provision, "Section 6", under the terms of which Fidelity had arranged with an insurance company for life insurance by a multiple life policy or equivalent individual policies (236A) covering the original registered holder of the contract, provided he be in good health and be accepted by the insurance company (1047), the policies providing that upon the death of the registered holder the insurance company would pay to Fidelity the amount required by Fidelity to declare the contract fully paid (178; 244; 313-315). Fidelity arranged with the Lincoln National Life Insurance Company to carry such insurance (230-231; 416). Approximately 67% of the series B Contracts contain Section 6, the insurance provision (681), and from the standard monthly payment of $7.50 but 50¢ per month for the first sixty months and 25¢ per month for the next sixty months was allocated to the insurance (683; 771).

In December, 1938, the Securities and Exchange Commission filed a bill for injunction against Fidelity in the District Court of the United States for the Eastern District of Michigan alleging that Fidelity was engaged in acts and practices in the sale of its securities which constituted violations of the provisions of the Securities Act of 1933 (328), and in that cause a consent decree was entered, among other things, enjoining Fidelity from failing to meet the deposit requirements of the several states

(612; Appendix X of Ex. 6, Report of the SEC on Investment Companies). In the same month a suit for the appointment of receivers was brought by certain contract holders of Fidelity in the United States District Court for the Northern District of West Virginia based on the facts developed in the suit in Michigan; but the bill was dismissed by the district court for the reason that insolvency was not established, and the decision was affirmed by the Circuit Court of Appeals (*Hutchinson* v. *Fidelity*, 106 F. (2d) 431).

The Investment Company Act of 1940

Congress enacted the Investment Company Act of 1940, effective as to face-amount certificate companies on January 1, 1941 (54 Stat. 789, 15 USCA 80a-52), wherein Congress found that investment companies issuing face-amount installment certificates were affected "with a national public interest" (242; 15 USCA 80a 1(a)) and enacted regulations to govern the sale of face-amount certificates, with which it was immediately apparent that Fidelity could not comply (243; 630; 701).

Attempted Extra Judicial Reorganization

In a futile effort to meet the situation, on December 31, 1940, Fidelity's corporate charter was amended, and its objects and powers were stated to be, "to issue insurance upon the lives of persons and every insurance appertaining thereto and connected therewith, and to grant, purchase and dispose of annuities", and its name was changed to Fidelity Assurance Association (243; 405; 701). Fidelity had not previously had charter powers to issue contracts of insurance (Ex. 20, 398; Appendix).

Under the West Virginia statutes (Code 33-9-1 and 33-2-12, Appendix) Fidelity's license, under said Article 9, to issue face-amount installment certificates would not

expire until April 1, 1941. The West Virginia Auditor issued Fidelity a license as an insurance company for the period from January 1, 1941, to April 1, 1941, but with the requirement on the part of the Auditor and the agreement on the part of Fidelity that no insurance would be sold and no new annuity contracts would be sold (227; 246; 406; 438; 701; 940-941). Except as it may be contended that the sending out of certain riders, hereafter mentioned under the subtitle "Proceedings in the Circuit Court of Appeals", to be attached to certain Series B Contracts, containing Section 6, already in existence, were in violation of the agreement, Fidelity observed the agreement and sold no insurance contracts, sold no annuity contracts, did no business by virtue of this license, and no changes were made in the books of Fidelity, no transfers were made and no surplus was set up (230-232; 406; 416; 438; 529; 541).

State Suits

Fidelity made application for a license as an insurance company for the year commencing April 1, 1941, but the Auditor of West Virginia withheld the license applied for and on April 4, 1941, directed Fidelity to discontinue business (231-232; 246; 406; 702). On April 11, 1941, the State Auditor, pursuant to Chapter 33, Article 2, Section 5 of the West Virginia Code, apparently in collaboration with Fidelity (944; 1190-1192), "for the purpose of rehabilitating and reorganizing" Fidelity (1204; Ex. 70, 751; 579), filed a bill (Ex. 21, 398) in the Circuit Court of Kanawha County, West Virginia, to take possession of the assets of Fidelity, and, Fidelity consenting thereto, receivers were appointed by said court (1192). The Auditor of West Virginia notified corresponding officials in the other states in which Fidelity was doing business (1215) and corresponding proceedings were promptly instituted in eleven other states (246; Ex. 29, 489; 499; 108).

Proceedings in the District Court

On June 6, 1941, Fidelity filed its petition in the United States District Court for the Southern District of West Virginia alleging insolvency and praying for reorganization under the provisions of Chapter X of the Bankruptcy Act (6). On the same day, by ex parte order, the petition was approved and your petitioner, Central Trust Company, was appointed trustee (1). On June 10, 1941, the District Court directed the various state officials and court receivers to deliver to the trustee all property of the debtor in their hands (11). On August 9, 1941, while the plenary hearing was in progress and after certain answers and motions of intervenors had been filed, the District Court modified the orders of June 6 and June 10, 1941, requiring the state officials and receivers to turn over to the trustee the assets of the debtor by revising the turn-over requirements and enjoining state officials and receivers from disposing of such assets (102). The West Virginia receivers, under protest (80-81) and the Ohio receiver, without protest (507-508), turned over to the trustee the property of the debtor in their respective custodies, while the other state officials and receivers generally retained possession of the deposits in their custodies (247).

The Auditor of West Virginia, the receivers appointed in the state court proceeding in West Virginia, officials of other states, receivers appointed by other state courts, and others were permitted to intervene and file answers and motions controverting the allegations of the petition and denying the jurisdiction of the District Court for various reasons, among others, that Fidelity was an insurance company and not subject to the provisions of Chapter X of the Bankruptcy Act, though the respondent Sims, State Auditor, originally admitted under oath that Fidelity was not an insurance company and was a corpo-

ration which could be adjudged a bankrupt (59), thereafter amending his answer (127), and that the petition was not filed in good faith; and the intervenors moved that the petition be dismissed and the turn-over orders be vacated (31; 48; 58; 79; 91; 93; 96; 118; 176-177; 186).

A protracted plenary hearing was had in the District Court after which the District Court found that Fidelity was not an insurance corporation, that the petition was filed in good faith, that the principal assets of Fidelity had been in the Southern District of West Virginia during the six months next preceding the filing of the petition, and that the filing of the petition, though not properly authorized originally, had been ratified by proper corporate action (187-202); and the District Court, by decree of January 5, 1942, approved the petition (175-176).

During the hearing, many witnesses testified that Fidelity could and should be reorganized (706-710; 732-737; 630-633; 689-692; 700-705; 479-481; 486-487; 450-451; 457; 415; 421; 322-323; 336-338; 525; 528; 544-545; 1105; 896; 942; Ex. 90, 802). Some memoranda looking toward the formulation of plans were presented (259; Ex's. 111, 112, 1075; Ex. 113, 1077; 1069; 1067), but no definite plan was acted upon by the District Court.

Proceedings in the Circuit Court of Appeals

The respondents, other than the Securities and Exchange Commission, appealed from the decree of the District Court to the Circuit Court. The respondent West Virginia Auditor filed in the Circuit Court a petition for the remand of the case to the District Court (217) and, for the first time, by said petition for remand, introduced into the record a showing that on December 31, 1940, Fidelity had sent out to the holders of Series B Contracts containing Section 6 a letter and certain riders in duplicate, one to be signed and returned to Fidelity and

the other to be attached to the contract, by which Fidelity would assume the insurance obligations of such Series B Contract (218-219), and in the hearing in the Circuit Court of Appeals it was stipulated that 9,802 of these riders had been signed by the contract holders and returned to Fidelity (237). Fidelity did not in fact assume such insurance obligations for the reason that Fidelity was never authorized by the Auditor of West Virginia to engage in the insurance business (230; 406; 416; 438; 529; 541), and the insurance obligations continued to be carried by the Lincoln National Life Insurance Company as before (231).

The Circuit Court found that Fidelity was an insurance company, not eligible for reorganization under Chapter X of the Bankruptcy Act, and that the petition had not been filed in good faith, apparently on the grounds that it was unreasonable to expect that any plan of reorganization could be effected (Sec. 146(3)) and that the interests of creditors would be best subserved in the prior proceedings pending in the state courts (Sec. 146(4)), reversed the judgment of the District Court and remanded the cause with instructions to the District Court to dismiss the petition (248-264).

The decree of the Circuit Court reversing the decree of the District Court and remanding the cause with instructions to dismiss, was entered on the 16th day of June, 1942 (263). The debtor, on the 13th day of July, 1942, presented its petition for a rehearing (264) to the Circuit Court which petition was denied by order of July 22, 1942 (267).

Upon application for a stay of the mandate, by assent of counsel, the Circuit Court entered an order on July 22, 1942, staying the mandate upon the condition that petition for certiorari be presented to this Court within thirty days, and modified the order of the District Court of Aug-

ust 9, 1941, so as to permit the various state officials and receivers to sell assets in their custody for the purpose of conserving the estate (268). Learning that some of the respondents considered the modification of the order of August 9, 1941, by the order of July 22, 1942, as a license to sell the assets in their custodies for liquidation, your petitioners, on August 7, 1942, filed a motion in the Circuit Court for modification of the amendatory order of July 22, 1942, so as to make it clear that the consent to the sale or exchange of assets was for conservation only and not for liquidation (271). This motion was set down for consideration at the next term of the Circuit Court (285). The presentation to this Court of the petition for certiorari and the subsequent granting of the petition apparently made further pressing of said motion unnecessary.

Petition for writ of certiorari was granted by this Court on October 12, 1942 (286; 87 L. ed. (Adv.) 33).

SPECIFICATION OF ERRORS URGED

The United States Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the debtor, Fidelity, was an insurance corporation within the meaning of the Bankruptcy Act, Section 4 of Chapter III, and, particularly, Section 106(3) of Chapter X thereof, and, therefore, ineligible to file a petition for reorganization under Chapter X of the Bankruptcy Act.

2. In holding that Fidelity's voluntary petition for reorganization was not filed in good faith as defined by Section 146 of the Bankruptcy Act.

3. In refusing to affirm the order of the District Court approving the petition and in reversing the judgment of said District Court and remanding the case with instructions to dismiss the petition.

SUMMARY OF ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT FIDELITY WAS AN INSURANCE CORPORATION INELIGIBLE TO FILE A PETITION FOR REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT.

(1) By the Investment Company Act of 1940, the Congress clearly and definitely classified companies engaged in business activities such as those engaged in by Fidelity as "face-amount certificate companies", one type of investment company, and as companies other than insurance corporations.

(2) By the laws of the State of West Virginia, the state of incorporation, Fidelity was definitely classified as an annuity company as distinguished from an insurance company, and as a corporation other than an insurance corporation.

(3) Fidelity did not have charter powers to issue insurance contracts prior to the December 31, 1940, amendment to its charter, and the business engaged in and carried on by Fidelity was that of selling and issuing annuity contracts, and not insurance contracts.

(4) The charter amendment of December 31, 1940, was procured as one step in an abortive effort to effect a voluntary, extra-judicial reorganization of Fidelity, and neither the procuring of the charter amendment nor the doing of any act thereafter by Fidelity transformed Fidelity into an insurance company within the meaning of the term as used in the Bankruptcy Act, as defined in the Investment Company Act of 1940, or in fact.

II. The Circuit Court Erred In Holding That the Petition of Fidelity, Filed Under Chapter X of the Bankruptcy Act, for Reorganization, Was Not Filed In Good Faith.

(1) That Fidelity had assented to the West Virginia State Court proceeding did not preclude Fidelity from filing its voluntary petition for reorganization under Chapter X of the Bankruptcy Act.

(2) The record not only does not show that "it is unreasonable to expect that a plan of reorganization can be effected", but, to the contrary, does show that it is quite reasonable to believe that a plan of reorganization can be effected.

Reorganization under Chapter X of the Bankruptcy Act is not limited to, and need not be, the complete rehabilitation of Fidelity as a going concern.

(3) The assets of Fidelity are physically located in many states. Already there are pending twelve separate proceedings in the courts of as many states. None of the state proceedings is under a state reorganization statute, and there is no prior proceeding pending in which the interests of the creditors are provided the safeguards afforded by Chapter X or in which the interests of creditors would be best subserved.

ARGUMENT

I. The Circuit Court Erred in Holding That Fidelity Was An Insurance Corporation Ineligible to File a Petition for Reorganization Under Chapter X of the Bankruptcy Act.

Introduction

It is believed that this point can be presented more clearly by first considering Fidelity and its activities dur-

ing the period of its unrestricted operations prior to December 31, 1940, when it ceased seeking new business and confined its activities to the receipt of installment payments on face-amount certificate contracts previously sold, and to the management of its properties and investments (406), and when, by charter amendment, it first obtained charter powers to issue life insurance policies and was licensed by the State Auditor as an insurance company (227), but licensed only upon condition that it issue no contracts of insurance and no new face-amount certificate contracts (438; 940-941). We shall then present the reasons why we believe that the character of Fidelity —from the point of view of eligibility to file a petition for reorganization under Chapter X—was not thereafter changed from that of a face-amount certificate company, eligible, to that of an insurance corporation, ineligible.

(1)

By the Investment Company Act of 1940, the Congress Clearly and Definitely Classified Companies Engaged in Business Activities Such as Those Engaged in by Fidelity as "Face-amount Certificate Companies", One Type of Investment Company, and as Companies Other Than Insurance Corporations.

It cannot be doubted that the Congress may, by reasonable classification, select the persons and corporations eligible for bankruptcy, voluntary or involuntary. *International Shoe Company* vs. *Pinkus*, 1928, 278 U. S. 261, 265; In re *Wisconsin Co-operative Milk Pool*, 1941, C. C. A. 7, 119 F. (2d) 999, 1002; *Kansas* vs. *Hayes*, 1932, C. C. A. 10, 62 F. (2d) 597, 599-600.

In fact, in the history of bankruptcy legislation, the Congress has at different times changed the classifications of eligibles and ineligibles. (See In re *Supreme Lodge of Masons*, 1923, D. C. N. D. Ga., 286 F. 180, 183).

By the Act of 1867 all moneyed, business or commercial corporations were made eligible for bankruptcy (Section 37, Act 1867). Under that Act, banks, railroads, building and loan associations, and insurance companies were all eligible for bankruptcy. The Act of 1898 provided for the bankruptcy of corporations principally engaged in manufacturing, trading, printing, publishing, mining or mercantile pursuits. The amendment of 1910 restored the general eligibility of moneyed, business or commercial corporations of the Act of 1867, but made the specific exceptions of municipalities, banks, railroads, and insurance corporations. Under that amendment building and loan associations were eligible for bankruptcy. More recently, under the Act of 1932 building and loan associations were added to the list of ineligibles. Neither the amendment of 1910 nor the amendment of 1938 specifically defined any of the excluded corporations.

Prior to 1910, whether or not a corporation was an eligible or an ineligible was determined by the principal activities of the corporation. (Remington, First Edition, Section 87). No doubt, in enacting the 1910 amendment, the Congress thought and intended that the classification of a corporation as an eligible or ineligible would continue to be determined by the corporate activities. We believe that, as will hereafter be argued, the business activities of the corporation have, in fact, continued to be recognized as the test (Remington, Fourth Edition, Section 92), though some confusion has been introduced into some of the decisions of some of the Circuit Courts of Appeals by resort to a supposed principle of selection, frequently referred to as the "state classification" principle.

Be that as it may, the Congress, by omitting to define the designated ineligibles in the amendments of 1910 and 1938, did not estop itself from providing a definition by some later act and, so far as distinguishing annuity, face-

amount certificate, companies from insurance companies, we believe the Investment Company Act of 1940 has provided in unmistakable terms the definitions of face-amount certificate companies and of insurance companies and that such definitions by said Act were made for the purposes, among others, of bankruptcy and reorganization, and that, under said definitions, Fidelity was clearly a face-amount certificate company and not an insurance company, not only prior to the charter amendment of December 31, 1940, but, as well, thereafter.

In this connection it is well to recognize that there is no occasion for any express provision or enactment that annuity companies or face-amount certificate companies, are or shall be eligible for bankruptcy. Such companies, unquestionably being moneyed, business and commercial corporations, are under the general and comprehensive provisions of the Bankruptcy Act and are eligible unless they be of one of the five types of corporations excluded: municipalities, banks, railroads, insurance, building and loan. It is not contended by the respondents that Fidelity is of any type of the ineligible corporations other than insurance.

So, if the Congress, with a view to bankruptcy, has said that face-amount certificate companies, such as Fidelity, are not insurance companies, Congress has, by implication, said that face-amount certificate companies are eligible for bankruptcy, just as clearly, effectively, and unmistakably as Congress might have done by adding to the Investment Company Act or to the Bankruptcy Act in express words a provision that face-amount certificate companies should be eligible for bankruptcy. Stated otherwise: the Investment Company Act of 1940 dealt with investment companies, and particularly with face-amount certificate companies, one type of investment company, defined such companies and expressly preserved

with respect to investment companies the jurisdiction of the district courts for reorganization under Chapter X of the Bankruptcy Act (Investment Company Act of 1940, Section 25, Appendix); and, further, for the purpose of distinguishing and exempting insurance companies, defined insurance companies. Said Act further expressly amended the Bankruptcy Act and inserted therein provisions for particular application to face-amount certificate companies, named as such (Investment Company Act, Section 29(b)). Therefore, when the Congress so recognized face-amount certificate companies as being within the provisions of the Bankruptcy Act by expressly reserving the jurisdiction for reorganization under Chapter X and by enacting particular provisions for application to face-amount certificate companies in bankruptcy, Congress meant face-amount certificate companies as defined in that Act. And a face-amount certificate company, as defined in said Act, is not an insurance company as defined in said Act.

By the Investment Company Act of 1940, Congress has defined a "face-amount certificate" as follows:

> "(a) When used in this subchapter and sections 72 (a), last sentence, and 107 (f) of Title 11, unless the context otherwise requires—*
>
> "• • •
>
> "(15) 'Face-amount certificate' means any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums

*Sections 72(a) and 107(f) of Title 11, Bankruptcy, are the provisions of the Investment Company Act of 1940, which expressly amended the Bankruptcy Act as such and in the following language:

Sec. 29. (a) Section 67 of an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, as amended, is amended by adding at the end thereof the following:

at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount (which security shall be known as a face-amount certificate of the 'installment type'); or any security which represents a similar obligation on the part of a face-amount certificate company, the consideration for which is the payment of a single lump sum (which security shall be known as a 'fully paid' face-amount certificate)."

(15 U. S. C. A., §80a-2 (a) (15)).

Congress has defined an "investment company" as including the business of issuing face-amount certificates:

"(a) When used in this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, 'investment company' means any issuer which

"• • •

"(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

"• • •"

(15 U. S. C. A. §80a-3 (a) (2)).

In fact, the "face-amount certificate company" is one of the three principal classes of investment companies:

"For the purposes of this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, investment companies are divided into three principal classes, defined as follows:

"(1) 'Face-amount certificate company' means an investment company which is engaged or proposes to engage in the business of issuing face-

amount certificates of the installment type, or which has been engaged in such business and has any such certificate outstanding.

"* * *"

(15 U. S. C. A., §80a-4 (1)).

Congress has gone further. The Investment Company Act of 1940 expressly amended certain sections of the Bankruptcy Act for particular application to face-amount certificate companies. It prescribed a particular method for the selection of the trustee:

"* * * If the bankrupt is a face-amount certificate company, as defined in section 80a-4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard."

Aug. 22, 1940, c. 686, Title I, §29(b); 11 U. S. C. A., §72a.

The Investment Company Act particularly amends the Bankruptcy Act with respect to deposits or transfers of securities by face-amount certificate companies (Aug. 22, 1940, c. 686, Title I, §29(a); 11 U. S. C. A., §107f(1) (a); (Appendix), manifesting an unmistakable Congressional intent that face-amount certificate companies be within the provisions of the Bankruptcy Act. And Section 25 (15 U. S. C. A. 80a 25(d)) expressly recognizes and reserves the jurisdiction of district courts over investment companies under Chapter X relating to reorganization.

Counsel for the West Virginia respondents, in their brief in the Circuit Court, recognized that the Investment Company Act of 1940 provided for "bankruptcy of face-amount certificate companies."

The Investment Company Act does not stop with the defining of face-amount certificate companies but, for the purpose of contrasting investment companies, particularly face-amount certificate companies which are within the Act, with insurance companies which are excepted from the Act, defines an insurance company as follows:

> "(a) When used in this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, unless the context otherwise requires—
>
> "• • •
>
> "(17) 'Insurance company' means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such."
>
> (15 U. S. C. A., §80a-2 (a) (17)).

Under this definition of an insurance company, even if the sending out by Fidelity of the riders to the Series B Contracts having the §6 (insurance) provisions were the making of insurance contracts as was concluded by the Circuit Court, we believe without thorough consideration, yet, Fidelity, would not be within the definition of an insurance company for the reason that, admittedly, the insurance features of the Series B Contracts were but incidental to the face-amount certificate contracts, the issuance of which was the primary and predominant business activity of Fidelity.

The Investment Company Act (15 U. S. C. A., 80a-3 (c) (3)), excludes an insurance company from the definition of an investment company, but face-amount certificate

companies not only are not so excluded but are expressly defined as investment companies and as one of the three principal divisions thereof (15 U. S. C. A., 80a 3(a) (2), 4 (1)).

Section 3 of the Investment Company Act (15 U. S. C. A., 80a-3 (c) (6)) shows that the issuing of face-amount certificates is one of the principal earmarks of an investment company.

In this particular case, Fidelity is not exempted from the provisions of the Investment Company Act or of the Bankruptcy Act by Section 6 of the Investment Company Act (15 U. S. C. A., 80a-6 (a) (2)) for the reason that there was no proceeding pending in a court of the United States or of a state in which a receiver was appointed for Fidelity prior to the effective date of said Investment Company Act, which was, as to face-amount certificate companies, January 1, 1941 (Aug. 22, 1940, c. 686, Title I, §53, 15 U. S. C. A., §80a-52). The State court proceedings were not instituted until April 11, 1941 (Ex. 70, 751).

In connection with some of the argument hereinafter, it is significant to observe that by the very definition of an insurance company in the Investment Company Act (15 U. S. C. A., 80a-2 (a) (17)), the nature of the organization of the company, including charter powers, and the character of the state supervision are but conditions precedent, so to speak, to acceptance of a company as an insurance company. The really determinative factor is made dependent upon the company's "primary and predominant business activity", which, in order that the company be so classified, must be "the writing of insurance or the reinsuring of risks underwritten by insurance companies, * * *."

The Circuit Court in observing

"* * * But this question need not be decided now, for, in our opinion, the scope of the provision by

> which municipal, railroad, insurance and banking corporations are excepted from bankruptcy proceedings is to be determined in any case *by the classification of the corporation under the law of the state of its creation rather than by the character of its predominant business activity.*" (Italics ours.) (248),

apparently overlooked the definition of an insurance company under the Investment Company Act when that Court said that the "predominant business activity" was not determinative, whereas Congress, using substantially the same terminology, had expressly provided that the "primary and *predominant business activity*" must be the writing of insurance if a company be considered an insurance company, as distinguished from an investment company.

Whatever may have been the status of the law prior to the enactment of the Investment Company Act of 1940, it is believed that by that Act the Congress has expressly defined corporations such as Fidelity as investment companies, companies other than insurance companies, and that the Circuit Court erred in finding that Fidelity was an insurance corporation.

(2)

By the Laws of the State of West Virginia, the State of Incorporation, Fidelity was Definitely Classified as an Annuity Company as Distinguished from an Insurance Company, and as a Corporation Other Than an Insurance Corporation.

It is not questioned that from 1912 to December 31, 1940, Fidelity operated under the provisions of Article 9, Chapter 33 of the West Virginia Code. Section 1 of said article (Appendix) expressly provides:

"• • • Provided, however, that *this article shall not be construed as applying to* persons, associations or corporations engaged in selling merchandise in installments, *insurance companies,* foreign or domestic, duly authorized to do business in this State, • • •." (Italics ours.)

If it can be said that the State classification of Fidelity is that Fidelity is an insurance company, then, by the very express terms of the article, enacted for the supervision and regulation of annuity companies, annuity companies, as insurance companies, are excluded from the operation of the statute, rendering the article, for all practical purposes, nugatory and without subject matter upon which to operate.

Again, the West Virginia statutes under which the state court proceeding was instituted in West Virginia (Code 33-9-10, 33-2-45, Appendix) provide that the insurance commissioner shall have the same authority in this respect over annuity corporations as he has over insurance companies. If Fidelity were an insurance company, there would be no reason for the enactment of any statute to make specifically applicable to annuity corporations the statutory provisions already applicable to insurance companies.

A corporation is not necessarily a banking, building and loan, or insurance corporation merely because it is chartered under laws relating generally to the banking, building and loan, or insurance business, or to the governmental departments which supervise or regulate them.

In the case *In re Prudence Co., Inc.,* C. C. A. 2, 1935, 79 F. (2d) 77, the corporation involved was formed under the article of the Banking Law of New York relating to investment companies, and was under the supervision of the superintendent of banking, but it was held not to be

a banking corporation within the meaning of the Bankruptcy Act. The Banking Law of New York was entitled "An Act in relation to banking corporations * * * and corporations under the supervision of the banking department".

So, with respect to Fidelity, the chapter of the West Virginia Code under which Fidelity operated was entitled "Insurance and Annuity Contracts", and, although insurance and annuity corporations may be dealt with by the same chapter of the West Virginia Code and may be under the supervision of the Insurance Commissioner, it cannot be contended that every corporation which operates under said Chapter 33 is an insurance company with any greater success than it was contended in the *Prudence* case that every corporation operating under the Banking Law of New York was a banking corporation. In Chapter 33 of the West Virginia Code there are different articles dealing with different types of corporations—particularly insurance corporations on the one hand and annuity corporations on the other—just as, under the New York Banking Law, there were different articles dealing with different types of corporations, including banking, trust, safe deposit, and investment companies. Article 9, Chapter 33 of the Code of West Virginia is the article under which annuity companies, defined by the Congress as face-amount certificate companies, have operated.

Likewise, in the case of *Gamble* v. *Daniel*, C. C. A. 8, 1930, 39 F. (2d) 447, the corporation involved, Peters Trust Company, was chartered under Title V of the laws of Nebraska. Article 19 of said Title V related to "Trust Companies," while Article 17 of said title related to "Banks." Although trust companies were invested with most of the powers usually exercised by a bank, the striking exception being that of receiving deposits, it was held,

and properly so, that the corporation involved was a trust company and not a banking company, and was subject to bankruptcy.

In *Capital Endowment Company* v. *Kroeger*, C. C. A. 6, 1936, 86 F. (2d) 976, 979, following the *Prudence* case, it was held:

> "* * * But the present debtor is not an insurance corporation. It was organized under the general incorporation law of Ohio, and while it later qualified as a bond investment company, it is not denied that it abandoned this field prior to the filing of its petition. *The mere fact that bond investment companies were placed under the supervision of the Superintendent of Insurance could neither enlarge their powers nor alter their business* * * *." (Italics ours.)

It is not without significance that the State Auditor, who, as ex-officio Insurance Commissioner, had supervised the activities of Fidelity for eight years, in his answer and controversion to the petition (59), which was duly verified by him (79), said:

> "* * *
>
> "Respondent admits that the debtor is a corporation which could be adjudged a bankrupt under the Federal Bankruptcy Act, and is not a municipal, insurance or banking corporation, or building and loan association, and is not a railroad corporation authorized to file a petition under the provisions of the Bankruptcy Act.
>
> "* * *"

As a matter of pleading this admission by the State Auditor was amended (127) upon motion of counsel for the State Receivers, assented to by counsel for Fidelity, but as a matter of evidence it may be questioned whether the

force of the sworn admission is materially lessened by the unverified amendment by counsel.

Apart from the effect of the Investment Company Act of 1940, it is earnestly believed that by the laws and administrative practices of the State of West Virginia Fidelity has been classified as a corporation other than an insurance corporation.

(3)

Fidelity Did Not Have Charter Powers to Issue Insurance Contracts Prior to the December 31, 1940 Amendment to its Charter, and the Business Engaged in and Carried on by Fidelity was that of Selling and Issuing Annuity Contracts, and not Insurance Contracts.

If thought be given to the multiple and diverse powers that are found in the charters of many corporations, the different types of state statutory provisions under which corporations are chartered, the different agencies by which corporations of some types are supervised or regulated, and the many different businesses in which a single corporation frequently engages, it is immediately apparent that a practical and orderly administration of the law permits one and only one real rule of classification; that is, the rule of classification based upon the primary and predominant business activity, usually referred to as the "corporate activities" test.

That is the principle which has been applied by this Court in determining whether a corporation, even though chartered under state insurance laws, is or is not an insurance corporation under the revenue statutes. *Bowers* v. *Lawyers Mortgage Co.*, 1931, 285 U. S. 182; *United States* v. *Home Title Insurance Co.*, 1931, 285 U. S. 191.

That is the principle adopted by the Congress in enacting the Investment Company Act of 1940, distinguishing investment companies from insurance companies.

In the last analysis that is the principle which has been applied even in the cases in which lip service has been given to the so-called "state classification" principle.

In adopting the definitions of the Investment Company Act of 1940, beyond doubt the Congress accepted and adopted the principle or test laid down by this Court in the *Lawyers Mortgage Company* and *Home Title Insurance Company* cases and, recognizing the impracticability of the so-called "state classification" principle or test as reflected by the decisions of various of the circuit courts of appeals which had attempted to apply the so-called "state classification" principle, adopted the real and practical test of business activities.

The only remnant of the so-called "state classification" theory found in the Investment Company Act definitions is that which would restrict, rather than extend, the corporations defined and thereby classified as insurance companies by limiting an insurance company to that "which is organized as an insurance company, * * *" and "* * * which is subject to supervision by the insurance commissioner or a similar official or agency of a state; * * *" even though the primary and predominant business activity of the corporation might be "the writing of insurance or the reinsuring of risks underwritten by insurance companies". In other words, even though the primary and predominant business activity of the corporation might be the writing of insurance, it would still not be an insurance company, under the Investment Company Act definition, unless it were organized as such and subject to supervision by a state insurance commissioner. On the other hand, even though such company might be so organized and subject to supervision by a state insurance commissioner, it would, nevertheless, not be an insurance company unless its primary and predominant business activity were the writing of insurance.

The so-called "state classification" theory has been practicable for application only in those situations where the business activities were clearly harmonious with the charter powers, their statutory source, and the nature of the regulatory agency, if there were a regulatory agency (See *Security B. & L. Association* v. *Spurlock*, C. C. A. 9, 1933, 65 F. (2d) 768; *Republic Underwriters* v. *Ford*, C. C. A. 5, 1938, 100 F. (2d) 511; *In re Pacific States Savings & Loan Co.*, D. C. S. D. Cal. C. D., 1939, 27 F. Supp. 1009; and *State of Kansas* v. *Hayes*, C. C. A. 10, 1932, 62 F. (2d) 597). On the other hand, where the nature of the charter powers and their statutory source have been debatable, the corporate activities have been actually relied upon even though lip service may have been given to the "state classification" theory. *In re Prudence Co., Inc.*, C. C. A. 2, 1935, 79 F. (2d) 77; *Clemons* v. *Liberty Savings, etc.*, C. C. A. 5, 1932, 61 F. (2d) 448; *Capital Endowment Co.* v. *Kroeger*, C. C. A. 6, 1936, 86 F. (2d) 976; *Gamble* v. *Daniel*, C. C. A. 8, 1930, 39 F. (2d) 447.

The "business activities" have been accepted as the true basis of classification when the inquiry was whether or not the corporation was a "moneyed, business or commercial corporation." *In re Roumanian Workers Association of America*, C. C. A. 6, 1940, 108 F. (2d) 782; *Schuster* v. *Ohio Farmers Co-op. Milk Association*, C. C. A. 6, 1932, 61 F. (2d) 337.

Where the Circuit Court of Appeals, Second Circuit, attempted to apply logically the "state classification" theory, the result was that the Union Guarantee & Mortgage Company (*In re Union Guarantee & Mortgage Company*, C. C. A. 2, 1935, 75 F. (2d) 984, 985) was held to be an insurance corporation ineligible for bankruptcy and reorganization because that company was organized under the insurance law of the State of New York, while the Prudence Company (*In re Prudence Co., Inc.*, 79 F. (2d)

77) was held to be neither an insurance company nor a banking company for the reason that it was not incorporated under the insurance laws and, though incorporated under the Banking Law, it was under the article of the Banking Law relating to investment companies rather than to banks, although the business of the Prudence Company was, for all practical purposes, identical with the business of the Union Guarantee and Mortgage Company. Of the business of the Union Guarantee and Mortgage Company in the opinion it was said: "* * * and its business was to make loans secured by mortgages on real property which it sold to its customers with a guaranty." Of the business of the Prudence Company in the opinion it was said: "* * * Its business has consisted in making mortgage loans on real estate and selling the mortgages to the public with its guaranty of payment."

With these decisions no doubt before the committees thereof, it is not surprising that the Congress, in enacting the Investment Company Act of 1940, did not adopt as the basis for classification in its definitions the so-called "state classification" rule.

Fidelity did not have charter powers to issue insurance contracts prior to December 31, 1940, and had never issued a single policy. Even after December 31, 1940, Fidelity did not have actual state authority to issue a single insurance policy (438). As another step in the abortive effort at voluntary extra-judicial reorganization, it sent to the holders of Series B Contracts, including Clause 6, the insurance feature, and received back, accepted by the contract holders, a number of offers to the contract holders to assume the insurance obligation carried by the Lincoln National Life Insurance Company incidental to some of Fidelity's annuity, face-amount certificate, contracts, at a time when Fidelity was not bona fide licensed to sell insurance contracts and when, and

after which time, in fact, the Lincoln National Life Insurance Company continued to carry the risks incidental to such annuity contracts. But Fidelity has not incurred a penny's liability under said insurance riders, so-called, it not appearing from the record that the Lincoln National Life Insurance Company is not fully solvent and able and willing to meet all of the obligations of its insurance contracts.

Fidelity has not, in fact, at any time engaged in the insurance business at all. Much less has insurance been at any time the principal business activity of Fidelity.

(4)

The Charter Amendment of December 31, 1940, was Procured as One Step in an Abortive Effort to Effect a Voluntary, Extra-judicial Reorganization of Fidelity, and Neither the Procuring of the Charter Amendment nor the Doing of any Act Thereafter by Fidelity Transformed Fidelity into an Insurance Company Within the Meaning of the Term as Used in the Bankruptcy Act, as Defined in the Investment Company Act of 1940, or in Fact.

Counsel for the respondents, other than the Securities and Exchange Commission, in filing briefs in opposition to the petition, divided the legal points among themselves (Brief, Edgar B. Sims, etc., et al., in opposition to petition, p. 4). Counsel to whom the particular point was assigned stated:

> "The Respondents do not contend that investment companies or face-amount certificate companies are excluded from the provisions of the Bankruptcy Act. *Likewise, the Respondents do not contend and the Circuit Court of Appeals did not hold that prior to December 31, 1940, the Debtor was an insurance company and not an investment*

company or face-amount certificate company. * * *"* (Italics ours.) (Brief, John B. Gontrum, etc., p. 9.)

" * * *We have made no claim and make none here that Fidelity was an insurance company prior to December 31, 1940."* (Italics ours.) Brief, Banking Commission of Wisconsin, et al., pp. 25-26.)

We do not know whether or not the same concession will be made by counsel for the respondents in the briefs upon the hearing in this Court, or in oral argument. Though the concession is but an inescapable conclusion, and a very proper one, it was not made in the Circuit Court.

The concession, if renewed, should also dispose of the contention previously made in the Circuit Court by counsel for the respondents and apparently accepted by the Circuit Court (255-256) that Fidelity was an insurance company for the reason that, under the statutes of West Virginia relating to life insurance companies (Code 33-3-7; Appendix) and under like statutes of many other states (see statutory references in footnote to Circuit Court Opinion (256)), life insurance companies are authorized to issue annuity contracts. This argument was that life insurance companies under the statutes of West Virginia and those of several other states were authorized to issue annuity contracts; Fidelity issued annuity contracts; Therefore, Fidelity was an insurance company.

The fallacy of such a contention is immediately apparent and was clearly exposed in the case of *Gamble* v. *Daniel*, C. C. A. 8, 1930, 39 F. (2d) 447, in which it was held that a trust company was not a banking corporation merely because it had many of the powers enjoyed and exercised by banking corporations. The corporation there considered, although it was invested with most of the

powers usually exercised by banking corporations, did not have the authority to receive deposits. So, in the case at bar, life insurance companies may issue annuity contracts and annuity companies of course may issue annuity contracts, but the fact that the annuity company may exercise that one power which the insurance company also has, does not mean that the annuity company is an insurance company when the annuity company does not have the really determinative power, the power to issue insurance contracts, the criterion of an insurance company.

So, if, as we believe we have demonstrated and as counsel for the respondents have heretofore conceded, Fidelity was not an insurance company prior to December 31, 1940, let us see what Fidelity has done on and after December 31, 1940, to be transformed into an insurance company.

Fidelity did procure a charter amendment on December 31, 1940, which would have authorized it to issue life insurance contracts, had it been able otherwise to qualify under the laws of the State of West Virginia and of other states as an insurance company (West Virginia Code 33-3-1; Appendix).

The West Virginia Auditor issued Fidelity a license as an insurance company from January 1, to April 1, 1941—it is said, in order to enable Fidelity to continue to receive installment payments upon its annuity contracts previously sold—*but upon the express condition, gentlemen's agreement, that Fidelity would not sell anything "until they got right" with the* Auditor's Office (227; 438).

Fidelity already had a license as an annuity company to receive such installment payments up to April 1, 1941 (West Virginia Code 33-9-1, 33-2-12; Appendix). This license was not canceled or revoked, except as limited by the so-called gentlemen's agreement, and, if the install-

ment payments were received by Fidelity under any license, it is more likely that they were received under the annuity company license already in effect than under the new insurance license which, in reality, was never effective.

Counsel for the respondents have contended, and no doubt will contend in this Court, that, after the effective date of the Investment Company Act, January 1, 1941, as an annuity company which had not qualified and could not qualify under the Investment Company Act, Fidelity could not legally receive through the United States mail such installment payments even on annuity contracts previously sold. If receiving through the mails such installment payments was illegal for Fidelity as an investment company, annuity company, its activities in this respect were not purged of their illegality by the mere procurement of the insurance company charter, because Fidelity could not become an insurance company under the Investment Company Act merely by amending its charter, but only in addition thereto by causing the issuance of insurance contracts to become its "primary and predominant business activity". Fidelity, in procuring from the West Virginia Auditor the license as an insurance company for the purpose of receiving such installment payments, had definitely agreed with the Auditor not to issue any insurance contracts (406; 438; 940-941).

Next, the respondents will insist, as they have heretofore done, that, in violation of the agreement with the West Virginia Auditor, Fidelity did write some 9,802 insurance contracts or reinsurance agreements to assume as many risks by sending out to the holders of Series B Contracts containing Paragraph 6, the insurance clause, some 14,626 in number, the letter and rider offering to assume the insurance responsibility which was carried

by the Lincoln National Life Insurance Company, 9,802 of such riders being returned to Fidelity accepted by the contract holders (237-238). But even then the tail would wag the dog. Such insurance, even if assumed by Fidelity, which it was not in fact, was but an optional feature incidental to the annuity contracts sold by Fidelity, the selling of which—certainly, prior to its purporting to assume the insurance obligations to the contract holders, in fact carried by the Lincoln National Life Insurance Company—was the sole business of Fidelity, and the servicing of which, after such purported assumption, was the only business activity of Fidelity. Even if it should be conceded *arguendo*, which we do not do, that, by attaching these riders to these 9,802 annuity contracts, Fidelity entered into the identical insurance obligations which the Lincoln National Life Insurance Company had undertaken, still such life insurance undertaking would be but incidental to Fidelity's own annuity contracts and a minor phase of Fidelity's business activities. Disregarding the other series of contracts issued by Fidelity, this rider was accepted by only 9,802 of the 14,626 holders of Series B Contracts containing the insurance provision (237-238), and, of the typical monthly payment of $7.50, only 25 or 50 cents, depending upon the age of the contract, was attributed to the insurance feature (683; 771). So long as the Lincoln National Life Insurance Company continued to carry the insurance—as it did, in fact—the purported assumption by Fidelity, if it had any legal effect at all, would be nothing more than "additional security" for the contract holders as was observed in *Bowers* v. *Lawyers Mortgage Company*, 285 U. S. 182, 189, with respect to the activities of the company there under consideration which procured title insurance from a title insurance company but guaranteeed the mortgage loans.

As a matter of fact, all of these things done on and after December 31, 1940, did not change Fidelity's busi-

ness activities or financial obligatons in the least. They were simply steps taken in an abortive attempt at voluntary extra-judicial reorganization (1188; 1087-1091; 941-943; 881; 895-896).

Fidelity could not continue as an investment company because of the Investment Company Act of 1940 (243; 866-867). An insurance company, as defined by the Investment Company Act, was exempt from the provisions thereof. Fidelity wanted to become such an insurance company. It was successful in the first step, the procurement by amendment of its charter of the charter powers to issue contracts of life insurance. Fidelity had no further success in its efforts to make the transition. It never did obtain the legal right to issue life insurance contracts. The license to operate as an insurance company issued to it by the West Virginia State Auditor was a pure sham. Fidelity had a writing purporting to be a license giving it the right to issue life insurance contracts, but the licensing authority, the West Virginia State Auditor, having the power to stop all of Fidelity's business activities—as, in fact, he did early in April, 1941—delivered the sham license to Fidelity only upon the condition and agreement that Fidelity would issue no insurance contracts and no new annuity contracts; and Fidelity accepted and agreed to the conditions (940-941).

Fidelity sent out and received back, accepted by many of the annuity contract holders, the rider to the annuity contracts by which it would have assumed the insurance obligations carried by the Lincoln National Life Insurance Company—when, if ever, Fidelity could clear with the West Virginia State Auditor and get the right to issue insurance contracts. That time never came. Fidelity continued to remit the insurance premiums to the Lincoln National Life Insurance Company, just as it had done before, and the Lincoln National Life Insurance Company

continued to carry the insurance risks, just as it had done before (230-232).

These annuity contract riders—contended by the respondents to be life insurance policies—issued by Fidelity were but an aftermath of the hearing of this case. Their existence was never presented to the District Court, presumably because they were recognized as having no legal or factual significance, but they were first presented in the Circuit Court by the West Virginia State Auditor in a petition for a remand of the case to the District Court. The petition for the remand was not acted upon by the Circuit Court, but, without further development of the circumstance other than the procurement of a stipulation by counsel that 9,802 of such riders had been returned to Fidelity accepted by the contract holders and the filing of an affidavit by the secretary of Fidelity that Fidelity had issued no insurance contracts, the Circuit Court found that:

> "In the meantime (between December 31, 1940, and April 1, 1941), however, the company (Fidelity) had issued a substantial number of policies of insurance in the following manner, without requiring payment from the insured. * * *" (Parentheses ours.)

and, after reciting the history of the riders, concluded the observation by saying:

> "* * * The company continued to pay the premiums on the group policy issued by the Lincoln National Life Insurance Company so as to continue it in force." (246).

If these abortive attempts at voluntary extra-judicial reorganization changed the character of Fidelity and destroyed its eligibility for reorganization or bankruptcy,

then any corporation, without the knowledge of its creditors, may avoid, and deny to its creditors, bankruptcy, including the benefits of reorganization, by having its charter so amended as to give it insurance, banking, or building and loan association powers, and the corporation will be excluded from reorganization or bankruptcy not only if it never issues a policy, receives a deposit, or makes a loan, but even if it never receives unencumbered state authority to engage in such business activities. It is hardly possible that such could have been the intent of the Congress.

The effort at voluntary extra-judicial reorganization failed and it is respectfully submitted that the abortive effort did not alter the character of Fidelity as a corporation other than an insurance corporation as counsel for the respondents have conceded Fidelity to have been prior to that effort.

II. The Circuit Court Erred in Holding That the Petition of Fidelity, Filed Under Chapter X of the Bankruptcy Act, for Reorganization, Was Not Filed in Good Faith.

(1)

That Fidelity Had Assented To The West Virginia State Court Proceeding Did Not Preclude Fidelity From Filing Its Voluntary Petition For Reorganization Under Chapter X Of The Bankruptcy Act.

It is not disputed that Fidelity assented originally to the State Court proceeding.

No doubt, as matters have developed, it would have been wiser had Fidelity filed a petition under Chapter X prior to the effective date of the Investment Company Act

without making the futile effort to escape the operation of said Act by attempting to convert Fidelity into an insurance company, or, probably, failing in the effort to convert, to have resisted the proceeding in the West Virginia state court and to have immediately filed the petition in the District Court for reorganization.

However that may be, there was no great delay upon the part of Fidelity in recognizing the insufficiency and confusion of the many proceedings in the several state courts and the futility of relying upon the state court proceedings for reorganization (542). There were already differences of opinion between the West Virginia receivers and the Wisconsin receivers with respect to the objectives sought to be attained and the procedure therefor (412; 500). West Virginia has no reorganization statute (1206) and the West Virginia proceeding was no more than an equity receivership. It does not appear that any of the other state court proceedings were under reorganization statutes, if there are any such statutes in the other states concerned.

Even if the assent of Fidelity to the West Virginia state court proceedings were prompted by other than the most commendable motives, which we do not admit, the filing of the petition for reorganization in the District Court by Fidelity was not estopped. The controlling consideration is not the motive which impelled the filing of the petition, but is the interests of the creditors and stockholders and, in this case, it being apparent that all interests of the stockholders are gone, the creditors. Even though the officers of Fidelity may have lost their investments as stockholders, and Fidelity's assets may be less than its debts, yet Fidelity and its officers have a reponsibility to its creditors and a duty to take such action as may best subserve the interests of the creditors,

however many mistakes Fidelity and its officers may have previously made.

In the *Marine Harbor* case (1942, 87 L. ed. (adv.) 73, 76), the holding in the Rembaugh case (*Brooklyn Trust Co.* v. *Rembaugh*, C. C. A. 2, 110 F. (2d) 838) that a petition was not filed in good faith when the petitioner filed the same seeking to escape the jurisdiction of a state court to which it had voluntarily submitted its case, was disapproved; and it was held that the desire of the petitioner to escape the prior proceeding was immaterial and that the inquiry which Congress had prescribed by Section 146 (4), Chapter X, was whether "the interests of creditors and stockholders" would be better subserved by the prior proceeding or by the proceeding under Chapter X. In the *Marine Harbor* case it was found upon the particular facts there involved, the assets consisting of a single property and but one class of creditors being really interested, that the petition failed to show that the interests of the creditors and stockholders would be best subserved by the proceeding under Chapter X, but it was not because the petitioner had participated in the prior state court proceeding even though it was under the New York reorganization statute sometimes referred to as the Schackno Act.

The view of this Court in the *Marine Harbor* case presents a striking contrast to the estoppel doctrine which the Circuit Court would, at least by implication, apply to the case at bar in the observation that:

> "• • • Since the company deliberately assumed this new character to escape the requirements of the new federal and state statutes with respect to annuity companies, no weight should be given to the company's attempt to pose as an annuity company in the pending petition in bankruptcy. • • •" (255.)

If it appears from the record that the filing by Fidelity of the petition for reorganization will best subserve the interests of the creditors, the filing of the petition bespeaks good faith on the part of Fidelity and Fidelity's previous attitude towards reorganization under Chapter X or towards the state court proceeding is not material.

(2)

The Record Not Only Does Not Show That "It Is Unreasonable To Expect That A Plan Of Reorganization Can Be Effected", But, To The Contrary, Does Show That It Is Quite Reasonable To Believe That A Plan Of Reorganization Can Be Effected.

Reorganization Under Chapter X Of The Bankruptcy Act Is Not Limited To, And Need Not Be, The Complete Rehabilitation Of Fidelity As A Going Concern.

The scope of reorganization is very wide. It may include (1) "the sale or transfer of all or any part of its (debtor's) property to one or more other corporations theretofore organized or thereafter to be organized"; (2) "the merger or consolidation of the debtor with one or more other corporations"; or (3) "the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein". (Section 216(10), 11 U. S. C. A. 616(10).)

Obviously, and, as has been held in a number of cases* under this statute, as under 77B, reorganization is not lim-

*Slow, orderly, unified liquidation through another corporation. *In re Central Funding Company*, C. C. A. 2, 1935, 75 F. (2d) 256, 259. Group of stockholders eliminated. *In re Mortgage Securities Corporation*, C. C. A. 2, 1935, 75 F. (2d) 261. May be successor corporation. *Capital Endowment Company* v. *Kroeger*, C. C. A. 6, 1936, 86 F. (2d) 976, 979. Substitution of new debtor. *Continental Insurance Company* v. *Louisiana Oil Refining Corporation*, C. C. A. 5, 1937, 89 F. (2d) 333, 336. Not necessary that debtor present it-

ited to the full and complete rehabilitation of the debtor as a going concern, as the opinion of the Circuit Court of Appeals would seem to indicate to have been the only concept of reorganization entertained by that court (259).

In the Marine Harbor case in the Circuit Court of Appeals (1042, C. C. A. 2, 125 F. (2d) 296, 298), it was observed in the majority opinion:

> "* * * But even if it be unreasonable to expect that new money will be forthcoming or that any plan can be effected which will provide anything for the debtor or its shareholders, we do not think clause 3 of section 146, 11 U. S. C. A. Sec. 546 (3), requires dismissal of the debtor's petition; the reorganization may still go on in the interest of such creditors as shall be found entitled to share in the debtor's assets. * * *"

Judge Frank, agreeing with the majority opinion in this respect adds (p. 301):

> "The majority opinion recognizes that it is not at all necessary in order to avoid dismissal of a petition pursuant to Section 146 (3), to show that 'it is unreasonable to expect that a plan of reorganization be effected,' in which the debtor or its stockholders will participate. In the instant case, for instance, where, as the majority opinion states, the claims of the certificate-holders exhaust the debtor's property and no equity remains for the stockholders, there is no reason why (unless the stockholders furnish needed new money or other needed new consideration) a plan cannot be effected by

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self as a going concern proposing to continue as such. *R. L. Witters Associates* v. *Ebsary Gypsum Company*, C. C. A. 5, 1938, 93 F. (2d) 746, 746. Immediate sale of principal assets and ultimate liquidation of remaining assets by reorganized company. *In re Porto Rican American Tobacco Company*, C. C. A. 2, 1940, 112 F. (2d) 655, 657. See also *Old Fort Improvement Co.* v. *Lea*, C. C. A. 4, 1937, 89 F. (2d) 286.

which, without the expense or delay involved in foreclosure, the property will promptly be turned over to a new company, having no debts, all of the stock being ratably distributed among the certificate-holders. That some such plan can reasonably be expected to be effected under Chapter X is, we all agree, sufficient to prevent a dismissal pursuant to Clause (3)."

There is much testimony of qualified witnesses that in the opinion of such witnesses Fidelity can be reorganized.

The witness D. A. Burt, a man of wide business experience and connections (706), is of opinion that Fidelity can and should be reorganized. Upon an actuarily sound plan he believes that new capital might be available. The plan might embody insurance in whole or in part (706-710). The witness Hubert F. Young, whose business is that of supervising investments (630), believes that Fidelity could and should be reorganized. The reorganization might be effected through merger with another company having adequate capital or by the organizing of a mutual company, and the reorganized activities might include both annuities and insurance (630-633). The respondent and witness Edgar B. Sims, State Auditor and Ex-Officio Insurance Commissioner, who had supervised the activities of Fidelity for some eight years (434), thought there could be a reorganization under a mutual insurance company (457). H. Isaiah Smith, one of the respondent State Court Receivers, who also has given his full time to the affairs of Fidelity as an employee of the Trustee, is of opinion that Fidelity can be reorganized (479-480). Allen G. Messick, former chairman of the board of Fidelity, believes that there can be reorganization upon the basis of creating reserves consistent with the returns upon the securities available (544-545). The witness Raymond Latta, who has had experience in insurance

reorganization (1057-1058), says that it is possible to construct an actuarial plan of reorganization for Fidelity (1105) which might, if necessary, include a deferred liquidation (1123). Pell, Ltd., a financial organization, offered to buy the stock of Fidel, a subsidiary of Fidelity, and definitely expressed interest in Fidelity (1226). See also the testimony of Howard E. Reed (732-737).

There was and is much atmosphere or "color" about this proceeding substantiating the opinions expressed by these and other witnesses.

As has already been noted, the State Auditor who instituted the State Court proceeding and who, together with the receivers appointed in the State Court proceeding instituted by him (not depreciating the interests of the other respondents), may aptly be referred to as the principal respondents, was of the opinion that there could be reorganization and brought the suit for the purpose of rehabilitating and reorganizing Fidelity (457; 836; 1204). The State Auditor had even suggested the possibilities of resorting to "77B" (889; 1187). Counsel for the West Virginia receivers, among the principal respondents, states that he believes that there can be reorganization in the State Court (486; 624), but not in the Federal Court. In connection with this expressed view, it may be remembered that West Virginia has no reorganization statute and that reorganization in the State Court is necessarily limited to voluntary reorganization (1188; 1206), while the Federal Court has been invested by the Congress with jurisdiction to administer Chapter X, a very modern statute carefully drawn, after diligent study and research, for the very purpose of facilitating reorganization. The record shows many conferences among the Fidelity officers and representatives and by them with the State Auditor and with representatives of the Securities and Exchange Commission, all looking to reorgani-

zation (1190; 1087-1089; 1203; 895-896; 1155-1157). As was observed by the witness Risley, "Reorganization was the only thing that we were considering." "Reorganization is the only word that I heard mentioned in any of those conferences" (896). The possibilities of proceeding under Chapter X were considered (889; 950-952; 1184-1186) but resort was had to the State Court proceeding as a deliberate, though unwise, choice with full knowledge that the facilities of the reorganization court exercising jurisdiction under Chapter X might ultimately be necessary (704). The State Court receivers intended and were expected to present a plan of reorganization (689; 823-830).

Fidelity's aggregate assets amount to, in round figures, $21,100,000.00, or approximately ninety per cent (90%) of its aggregate liabilities, $23,476,000.00 (242; 196). The reserve funds of Income Reserve Contracts Series A, B, C, and D are solvent (1215; 632-633; 492-493; Ex. 21, 398). From 1934 until the end of 1940 the Series B Contracts represented a very large part of Fidelity's entire business (680; 685).

Upon the record the District Court concluded that Fidelity had met the burden of showing that it was not unreasonable to expect that a plan of reorganization might be effected.

The record shows very little with respect to the attitude of the creditors. The creditors have directly participated in the proceeding in only a most limited way. The only respondents who are creditors are L. H. Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr., Trustee. The other respondents are state officials, receivers or commissions. Though no point has been made thereof, it may be questioned whether they are persons who may controvert

the petition (11 U. S. C. A. 544). Until the creditors have knowledge of the possibilities of reorganization, it could hardly be expected that they would be able to formulate their own opinions upon the merits of reorganization or upon any particular plan.

Not to anticipate the discussion herein of 146 (4) but rather to suggest that this proceeding has not yet reached the stage where the attitude of the creditors has any particular significance, it may be recognized that to develop such information and present it to the creditors in a fair and impartial way is one of the very important features of Chapter X and one of the safeguards to creditors provided thereby. The indifference of individual creditors towards their own interests or their inability to present them was one of the principal reasons for the enactment of Chapter X, to rescue the creditors from complete reliance and dependency upon the information supplied and recommendations made by interested reorganization committees in the equity receivership proceedings, and to place upon the reorganization court under Chapter X the duty and responsibility of assembling full information and of presenting it to the creditors with sufficient fullness to enable the creditors to exercise an informed judgment. It is, therefore, not surprising that the creditors have not yet been active in this case. They cannot act intelligently until they are informed of their rights and interests.

Upon this record, can it be said that it is unreasonable to expect that some insurance or investment company can be found to take over or buy the assets of Fidelity under a contract for the benefit of the Fidelity contract holders, to issue them investment certificates or insurance policies, of one or more kinds of greater value than the dividends to such contract holders through the liquidation of Fidel-

ity would buy? Such an arrangement would afford the contract holders the benefit, in whole or in part, of the original selling costs of insurance policies or investment certificates which are, comparatively speaking, high and which will have been lost to the contract holders of Fidelity unless some plan of reorganization is effected (1103-1104). The purchaser of the assets might give the contract holders an option of taking in cash their determined equities in liquidation or of accepting an insurance policy or an investment contract which such equity would buy. A beneficial merger might be worked out with some other investment company or an insurance company. As suggested by the respondent West Virginia State Auditor (457), the organization of a mutual company to administer Fidelity's assets for the benefit of the contract holders is not beyond the realm of consideration. It should not be unreasonable to expect that at least the solvent funds or series of the Fidelity contracts might be reorganized and the solvent funds or series constitute a very material part of the assets and business of Fidelity (680). These observations are something more than a mere suggestion of remote possibilities. They are suggestions supported by the record and thoughts which should not be relegated to the realm of mere possibilities as distinguished from probabilities until there has been some opportunity to transform them into realities.

It is of course true that no plan of reorganization has yet been presented either to the Court or to the creditors, but it is also obvious that during all of this time, since the filing of the petition, when the basic jurisdiction of the District Court has been in controversy, no opportunity has been afforded for a determination of the rights and interests of the many classes of creditors, without which the formulation of a practical plan, for submission to the

Court and then to the creditors, would be a patent impossibility.

Just as valuation data, including debts and their classification, is necessary to enable the court to approve the plan, so also must the trustee have this information in a far-reaching and complicated case such as the case at bar in order to prepare a plan. Chapter X contemplates a full accounting as a condition precedent to the approval of the plan (*Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, 520, 523; 11 U. S. C. A. 575). Obviously this information could not be had prior to the determination of the basic jurisdiction of the reorganization court.

Necessarily good faith may be found in advance of the submission of a plan. Ordinarily jurisdictional good faith must be considered before the time for the presentation of any plan.

It is not believed that this case, long drawn out in the consideration of basic jurisdictional questions, had reached the stage of critical examination of plans of reorganization (*Continental Illinois Bank & Trust Company* v. *C. R. I. & P. R. Co.*, 294 U. S. 648, 685; *Chicago T. & T. Co.* v. *Forty-one thirty-six W. Corp.*, 1937, 302 U. S. 120, 133-134; *R. L. Witters* v. *Ebsary Gypsum Company*, 93 F. (2d) 746, 748; *In re Julius Roehrs Company*, C. C. A. 3, 1940, 115 F. (2d) 723, 724). The trustee should have an opportunity to explore the possibilities of reorganization, with assurances of the jurisdiction of the court by which appointed and, when there is no controversy with respect to the basic jurisdiction, with knowledge and after the determination of the broad principles by which the nature and extent of the claims of the many creditors are to be determined (*In re Marine Harbor Properties*, C. C. A. 2, 1942, 125 F. (2d) 296, 298).

The foregoing observations have been made from the point of view of a reorganization by merger, or by the sale of assets to some other corporation with a contract by the purchaser to pay in cash or by an insurance or annuity contract the full value of the various claims of the creditors of Fidelity as determined by the value of the assets of Fidelity in which the several classes of creditors may participate, as ascertained in this proceeding, or by the organization of a new mutual corporation entirely for the benefit of the creditors, or some such practical device. But, as a last resort, even a slow, orderly, unified, beneficial liquidation, which we do not believe to be inevitable in this case, is within the scope of reorganization and would certainly seem to be more practicable and more beneficial to the creditors than the divergent liquidations and distributions in the distinct and separate state proceedings as hereinafter discussed (*In re Central Funding Corporation, supra; In re Mortgage Securities Corporation, supra; R. L. Witters Associates* v. *Ebsary Gypsum Company, supra; In re Porto Rican American Tobacco Company, supra;* Bankruptcy Act, Chapter X, Sec. 216 (10); 11 U. S. C. A. 616 (10)). The District Court was well within its proper powers and jurisdiction in considering this as a possibility of reorganization in the last resort, in the event more desirable plans of reorganization for any reason should not materialize or should not be approved by the creditors.

The District Court had much upon which to base its conclusion that it was not unreasonable to expect that a plan of reorganization could be effected, and its finding in this respect should not have been reversed by the Circuit Court of Appeals. (*In re Mount Forest Fur Farms of America,* C. C. A. 6, 1939, 103 F. (2d) 69, 71, Cert. Den. 308 U. S. 583; *In re Equity Company,* 115 F. (2d) 570, 572-3.)

(3)

The Assets Of Fidelity Are Physically Located In Many States. Already There Are Pending Twelve Separate Proceedings In The Courts Of As Many States. None Of The State Proceedings Is Under a State Reorganization Statute, And There Is No Prior Proceeding Pending In Which The Interests Of The Creditors Are Provided The Safeguards Afforded By Chapter X Or In Which The Interests Of Creditors Would Be Best Subserved.

Securities of Fidelity have been deposited in fifteen states and yet remain there. Twelve distinct proceedings have been brought in as many states (246). Should this proceeding be dismissed it is likely that there will be three more such suits in courts of additional states.

The first suit was brought in the West Virginia State Court and the suits in the other states shortly followed. Differences of opinion between the West Virginia court receivers and the Wisconsin officials with respect to the management and disposition of the assets held in Wisconsin arose immediately (500; 542).

There is no single prior proceeding having jurisdiction over any of the assets of Fidelity other than those found within the borders of the particular state in which the proceeding was instituted or over all of the creditors of Fidelity. These proceedings in the several state courts are not under any reorganization statute and, apart from the want of jurisdiction of any particular proceeding over either the property of Fidelity generally or the persons interested in the subject matter, any reorganization which might be hoped for through the State Court proceeding could be only by voluntary agreement (1206; 1100-1101; 1188).

The West Virginia State Court proceeding is only a

proceeding in the nature of an equity receivership. The proceedings in the other states are equivalents thereof.

Section 77B was enacted to supply deficiencies in the old equity receivership proceedings and, later, Chapter X was enacted to supply deficiencies in both the old equity receivership proceedings and in the proceedings under Section 77B. One of the most striking of such deficiencies was the absence of any provision to inform fully the creditors and stockholders in order that they might intelligently consider the propos'ls of the corporate or reorganization management which of course had superior knowledge and occupied advantageous positions. In other words, Chapter X was designed to provide safeguards for the creditors and stockholders against the superior knowledge and advantageous position of the management.

In the *Marine Harbor* case, involving only one property and only one class of creditors really interested, the problem was a simple one, not necessitating the safeguards provided by Chapter X. However, the opinion in the *Marine Harbor* case clearly recognized the superiority of the Chapter X proceeding when the affairs of a corporation might be complicated. In the opinion it was observed

> "• • • And it is asserted that comparable safeguards are wholly or largely lacking in proceedings under the Schackno Act. Those considerations would be highly relevant and persuasive if this was a case of the usual reorganization proceeding dealing with more than one class of securities under the older procedures which chap. X was designed to improve and supplant. See Securities & Exch. Commission v. United States Realty & Improv. Co., supra (310 US p. 448, 84 L. ed. 1299, 60 S. Ct. 1044, 42 Am. Bankr. Rep. (NS) 602) H.

Rep. No. 1409, 75th Cong. 1st Sess. pp. 37 et seq. Then the safeguards afforded by chap. X would have special significance in protecting the respective classes of investors against improvident, unfair or inequitable adjustments, compromises, and settlements—steps which are basic to the reorganization process but which in selfish hands led to much abuse. * * *" (*Marine Harbor Properties, Inc.* v. *Manufacturer's Trust Co.*, 87 L. ed. (Adv.) 73, 77).

The opinion in the case of *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 1939, 310 U. S. 434, 448-450, presents the importance of the various safeguards of Chapter X.

The insufficiencies of the equity receivership proceedings are pointed out and the safeguards of Chapter X are considered and discussed by Judge Frank in his dissenting opinion in the *Marine Harbor* case, while that case was in the Circuit Court of Appeals (*In re Marine Harbor Properties, Inc.*, 1942, 125 F. (2d) 296, 302-306).

Among other factors of the Chapter X proceeding which enable proceedings thereunder to better subserve the interests of creditors are: the advisory reports of the Securities & Exchange Commission on the feasibility of the plan, as well as upon the question of whether or not the plan is fair and equitable; the report to creditors under Section 175, showing the creditors' interests and the value thereof, the creditors otherwise having no independent means of obtaining impartial information and advice; the independent study by the Securities & Exchange Commission and the examination by the court exclude collusive programs; the plan to be submitted to the creditors must be approved by the court prior to the submission to the creditors, which eliminates the reluctance which the

court might otherwise have about rejecting a plan after much work had been done to secure its approval; the independent appraisal of the assets of the debtor's estate by the Securities and Exchange Commission, an expert and disinterested agency, is of indispensable value to the proceeding—the importance of such an independent appraisal is fully shown in *First National Bank of Cincinnati* v. *Flershem*, 1934, 290 U. S. 504; the reorganization court has jurisdiction to retain supervision for the purpose of seeing that the plan is fully and fairly carried out.

No single one of the state courts is in a jurisdictional position to review all of the liabilities of Fidelity or to appraise its assets in order to give the creditors the information required by Section 175 of Chapter X. It does not appear that the state courts have the services of experts provided by the Securities and Exchange Commission.

It should be borne in mind that these various provisions or safeguards were adopted after long study by the Securities and Exchange Commission and were based upon the experiences of the equity receiverships and the proceedings under Section 77B and the needs demonstrated thereby.

If these safeguards do not better subserve the interests of creditors than do the procedures in the ordinary equity receiverships, then the work of Congress in causing the problems and necessities to be studied and in enacting Chapter X has been largely in vain. And if the Congress meant by Section 146(4) that the old equity receivership, from the standpoint of good faith, subserved the interests of creditors in a complicated and far-reaching case just as well as does the proceeding under Chapter X, then

Congress impliedly recognized the futility of its own work.

To the contrary, Congress expressly provided by Section 256 that the petition for reorganization under Chapter X might be filed and approved notwithstanding the pendency of prior proceedings, thus recognizing that many such prior proceedings would likely be insufficient or inefficient as compared with the procedure as provided by said Chapter X, recognizing also that resort might have been had to prior proceedings collusively for the very purpose of avoiding or escaping the requirements of Chapter X for the protection of creditors (Judge Frank in the *Marine Harbor* case, 125 F. (2d) 296, 306) (1094; 1103-1105).

It is not a sufficient answer for the respondents to say that they will voluntarily do all of these things in the several state court proceedings which Chapter X requires to be done in the reorganization proceeding. In the first place, no one of the state courts has the territorial jurisdiction over the subject matter and persons to do these things in behalf of all the creditors. The Congress has found it to be necessary to provide these safeguards as statutory procedural requirements, having found the voluntary inclinations to do these things, in the absence of statute, to be insufficient for the protection of creditors scattered throughout the land and individually holding several claims ordinarily of the size not sufficient to sustain individual participation in the widely dispersed litigation sufficient to protect the interests of the individual creditors, even assuming, which would probably be contrary to the fact, that a few interested and active creditors would be able, in the face of the inaction of thousands of others relying upon the management, to protect even their own interests.

It may also be recalled that the Congress has declared particularly that the business of investment companies, face-amount certificate companies, meaning the business of Fidelity, is affected with a national public interest, strongly suggesting that such a business can be effectively administered only by a court having national jurisdiction, which national jurisdiction has been invested in the bankruptcy court by Section 111 of Chapter X (11 U. S. C. A. 511).

Could it be that the Congress intended by Section 146(4) that the interests of the creditors of a business affected with a national public interest, actually extending into twenty-nine states, would be subserved better by the administration by twelve distinct state courts of limited territorial jurisdiction than by a single national court having national jurisdiction including jurisdicton of all property involved and all persons concerned?

If Congress contemplated that the interests of such creditors would be best subserved by the several state proceedings conducted without the statutory safeguards found to be necessary by the Congress, then Congress did not accomplish much by providing the statutory safeguards or by conferring upon the national courts full jurisdiction to administer them.

If voluntary reorganization through the state proceedings be relied upon, it is obvious that the creditors—many individuals having relatively small separate claims—will be at the mercy of those having charge, so to speak, of the several state court proceedings, one of the shortcomings of the old equity receivership for the elimination of which Chapter X was adopted.

None of the state court proceedings is under a statute which requires that the plan of reorganiaztion be sub-

mitted to the creditors only after it has been approved by the court, as is provided by Chapter X. None of these state proceedings is under a statute having provisions comparable to those of Chapter X for participation and guidance by an informed statutory agency such as the Securities and Exchange Commission.

At this time we are concerned only with jurisdictional questions and not with the relative rights and equities of the various creditors of Fidelity. However, since whether the jurisdiction of the District Court or the several jurisdictions of the state courts will best subserve the interests of creditors is a jurisdictional matter as related to good faith, it would seem to be not inappropriate to observe that there are some real questions which sooner or later will have to be resolved by some court with respect to the relative rights and interests of the various creditors and classes of creditors.

It is a real question whether any or all, and, if not all, which ones of the several series of contracts have resulted in the creation of trusts in particular assets for the benefit of the creditors whose payments have been invested therein. If any one or more of the series of contracts has resulted in the creation of a trust for the benefit of the contract holders whose payments have been invested in particular assets, there is then the question whether these assets may be followed and impressed with the trust in the hands of the state officials with whom such assets have been deposited (606-607; 611-612; 635-649; 653-655; 1072; 1179).

It is obvious that these questions must be finally resolved before the various creditors and classes of creditors can know what their interests in the assets of Fidel-

ity are and the value thereof. Certainly these questions must be finally resolved before there is any distribution of the assets of Fidelity.

The several state representatives, as well as the Tennessee creditors as represented by L. H. Brooks, Trustee, Frederic Leake and A. L. Goldberg, Jr., Trustee, apparently have proceeded upon the assumption that the several state deposits were made from free assets of Fidelity and should be applied upon the claims of the various creditors resident in the respective states (52; 94; 99-100) and, without regard for the claim that when such securities were deposited in such states, such securities were already, by the terms of such annuity contracts, held by Fidelity in trust for the holders of annuity contracts of the particular series, without regard for state lines, and under circumstances which might charge the state officials with knowledge of the trusts to which the securities accepted by them were subject (654-655).

The several state court proceedings at least threaten distribution of the assets held by the several states without the judicial determination of the possible rights and interests of the out-of-state creditors having interests or rights to participate in such assets. Obviously, these rights and interests must be determined before there can be any proper distribution of the assets and Chapter X (Sections 196 and 197) requires such ascertainment promptly after the petition is approved.

The question of the right of the contract holders to improve their contracts is also an important one. A contract does not have a surrender value until a substantial number of installments have been paid thereon (684). Do the contract holders who were not in default but who had not made sufficient installment payments to give their

contracts a surrender value have the right to continue the payments and thus bring about a surrender value (1261-1262)? This question also should be definitely determined before there is any distribution of the assets of Fidelity.

There is a substantial surplus of assets in Wisconsin, and there appear to be small surpluses in Delaware, Iowa, Missouri, and Alabama. Can it be that the interests of the creditors are best subserved by imposing upon them the responsibility of presenting their claims in the courts of many states in order to preserve their rights to participate in the distribution of all of the assets of Fidelity in which they are legally entitled to participate, however great or small the particular group of assets may be?

We believe, rather, that the very purposes of the Investment Company Act, and of the amendments thereof to the Bankruptcy Act, and of Chapter X were to avoid any such confusion and futility.

The Circuit Court seemed to be of opinion that the interests of the creditors would be best subserved because many questions of state law will likely arise and may be better determined by state courts. But questions under the laws of many other states also will arise in the courts of the several states. It would seem that the courts of one state would be in no better position to determine the laws of other states than is a federal court to determine the laws of the several states. Federal courts have always been required to consider state laws and there is no reason to believe that the District Court will not respect the laws of the several states involved when they become of importance in this proceeding.

The Circuit Court, following the case *In re Union Guarantee and Mortgage Co.*, 75 F. (2d) 984, accepted and approved the philosophy that "* * * Congress in ex-

cepting from the Bankruptcy Act those corporations, such as insurance, railroad and banking corporations, whose business during their active life and whose liquidation in case of insolvency are strictly regulated by State law. * * *" (262) manifested an intent to abandon such corporations, so to speak, because of the alleged conceded superiority of state supervision in these respects. If such ever were the Congressional policy, and it may have been at some earlier day, that Congressional policy was most certainly changed, in so far as face-amount certificate companies are concerned, by the enactment of the Investment Company Act of 1940, which found and declared that the activities of investment companies, including face-amount certificate companies, were affected with a national public interest and provided for their supervision and regulation by a federal agency, the Securities and Exchange Commission, during life, and also made available for their administration, upon their demise, the bankruptcy courts, with Securities and Exchange Commission participation.

In the *Marine Harbor* case the property was located in only one state and there was only one class of creditors that could, by any possibility, participate in the assets of the debtor. The proceedings in the case at bar involve assets in many states and creditors, obviously, of many classifications as holders of the several series of contracts issued by Fidelity and questions with respect to the assets in which the various classes of creditors are entitled to participate.

The situation in the case at bar is more like that considered by United States District Judge Bryant in the *National Surety Company* case (*In re National Surety Company*, 7 Fed. Supp. 959, 961), with respect to which the following observation in the opinion is convincing:

"It is with regret that I refuse to take jurisdiction. I say this because it is apparent that future administration could be more readily carried on under one control than under the limited jurisdiction of several state courts. It seems almost a travesty to have to deny to this company the benefits of sections 77A and 77B of the Bankruptcy Act while its principal subsidiary is being administered thereunder. However, to hold differently would be the taking of powers that Congress did not deem it wise to give."

The jurisdiction which Judge Bryant considered to be so needed in the *National Surety Company* case exists in the case at bar and its appropriateness and superior suitability is clear.

If there ever has been or ever will be a case in which a single court of competent jurisdiction is needed to take charge of the diverse and complicated affairs of a debtor corporation for the purposes of reorganization, even if that reorganization be no more than an orderly liquidation, we believe it is the case at bar; and, we further believe that Chapter X of the Bankruptcy Act and the Investment Company Act of 1940 were tailor made, so to speak, to meet this situation, and that this is not a factual situation with respect to which there could possibly be a prior state court proceeding which would best subserve the interests of the creditors.

CONCLUSION

For the reasons aforesaid, it is urged that Fidelity is not an insurance company, that the voluntary petition of Fidelity for reorganization under Chapter X was filed in good faith, that the order of the United States

Circuit Court of Appeals for the Fourth Circuit should be reversed, and that the order of the United States District Court for the Southern District of West Virginia should be affirmed.

Respectfully submitted,

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Charleston, West Virginia,
January 9, 1943.

APPENDIX

FEDERAL STATUTES

Bankruptcy Act

CHAPTER III

Section 4, (11 U. S. C. A. 22):

(a) Any person, except a municipal, railroad, insurance or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.

(b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act. • • •

CHAPTER X

Section 106(3), (11 U. S. C. A. 506):

For the purposes of this chapter, unless inconsistent with the context—

(3) "corporations" shall mean a corporation, as defined in this Act, which could be adjudged a bankrupt under this Act, and any railroad corporation excepting a railroad corporation authorized to file a petition under Section 77 of this Act.

Section 144, (11 U. S. C. A. 544):

If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing it if not so satisfied.

Section 146, (11 U. S. C. A. 546):

Without limiting the generality of the meaning of the term "good faith," a petition shall be deemed not to be filed in good faith if—

(1) • • •

(2) • • •

(3) it is unreasonable to expect that a plan of reorganization can be effected: or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding.

Section 216(10), (11 U. S. C. A. 616(10)):

A plan of reorganization under this chapter—(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less

than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancelation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes.

Investment Company Act of 1940

Title I

Section 29(a), (11 U. S. C. A. 107 (f)):

Sec. 29. (a) Section 67 of an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, as amended, is amended by adding at the end the following:

"f. (1) For the purposes of, and exclusively applicable to, this subdivision f (a) 'debtor' shall mean a face-amount certificate company as defined in section 4 of the Investment Company Act of 1940; (b) 'face-amount certificate' shall mean a face-amount certificate as defined in section 2 of the Investment Company Act of 1940; (c) 'depositary' is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor or under other specified circumstances;

(d) 'deposit creditor' is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depositary, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor; and (e) 'State agency' is an official or agency of a State designated to act as depositary or to distribute property, or the proceeds of property held by a depositary.

"(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depositary for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph 3 of this subdivision f.

"(3) In the event any deposit or transfer described in paragraph 2 of this subdivision f shall be avoided the trustee shall segregate the property received by the trustee from the depositary and charge the same with the costs and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property, and each such creditor shall thereafter be entitled to dividends from the estate only after all creditors of the same rank shall have received the same percentage.

"(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any

parties under this subdivision f and to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depositary and State agency which is a party in interest.

"(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply."

Section 3(c3 (3) and (6), (15 U. S. C. A. 80-a-3 (c) (3) and (6)):

Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this title:

(3) Any bank or insurance company; any savings and loan association, building and loan association, co-operative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; * * *.

(6) Any person who is not engaged in the business of issuing face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

Section 25(d) (15 U. S. C. A. 80a-25(d)):

(d) Nothing contained in this section shall in any way affect or derogate from the powers of the courts of the United States and the Commission with reference to reorganizations contained in the Bankruptcy Act of 1898, as amended.

STATUTES OF WEST VIRGINIA

Michie's 1937 Code

Chapter 33, entitled "Insurance and Annuity Contracts"

Article 2, entitled "General Provisions"

Section 5. Issuance of License by Insurance Commissioner.—Upon receiving such certified copy and statement, the insurance commissioner may examine such company or association, and if he finds that it has complied with the terms of its charter or articles of association and the laws of this State, and with all the provisions in other sections of this chapter prescribing conditions precedent to the issuance of a license, or certificate of authority, and is satisfied that it is solvent (or if chartered or organized under the laws of any foreign country, is solvent in the United States), he may issue to it a license, or certificate of authority, stating such facts and authorizing it to issue policies, make contracts of insurance, and transact business in this State.

Section 12. Time Licenses Shall Continue in Force.—All licenses, or certificates of authority issued by the insurance commissioner to insurance companies or associations, or agents, solicitors or brokers, shall continue in force until the first day of April next following their issuance, unless the same be sooner revoked.

Section 45. Proceedings in Circuit Court of Kanawha County against Insolvent Company.—Whenever any company under the supervision and regulation of the insurance commissioner shall become insolvent or shall be in such financial condition as not to be able to pay its creditors in this State, the commissioner of insurance may file a bill in the circuit court of Kanawha county for the administering of the assets of such company as an insolvent, and for the purpose of taking possession of its property in this State and the distribution of its assets among those entitled thereto according to their respective right.

Article 3, entitled "Life Insurance"

Section 1. Capital of Life Insurance Companies.—No life insurance company shall be admitted to do business in this State, or shall, directly or indirectly, enter into contracts of insurance, issue policies, take risks or transact business in this State, unless it has at least two hundred thousand dollars cash capital fully paid up or a like amount of cash surplus, securely invested: Provided, That this section shall not apply to fraternal benefit societies organized in pursuance of the provisions of article eight of this chapter.

Section 7. Annuities May Be Issued by Life Companies.—Life insurance companies chartered by and doing business in this State, and empowered to make contracts contingent upon life, may grant and issue annuities, either in connection with or separate from contracts of insurance based upon life risks, and all such annuities heretofore issued by such companies shall be valid.

Article 9, entitled "Annuity Contracts"

Section 1. License from Insurance Commissioner Prerequisite to Engaging in Business.—No person, associa-

tion or corporation shall engage in the business of soliciting or receiving deposits or payments on any annuity contract or certificate or annuity bond in fixed and stipulated installments, within this State, without first having obtained from the insurance commissioner a license to do business in this State: Provided, however, That this article shall not be construed as applying to persons, associations or corporations engaged in selling merchandise in installments, insurance companies, foreign or domestic, duly authorized to do business in this State, building and loan associations, national banks and banking institutions organized and authorized to do business under the laws of this State, fraternal insurance societies, or surety companies doing business under the laws of this State. Such license shall be issued for one year, or the fractional part of a year, and for issuing the same a fee of ten dollars shall be charged; and the provisions of section twelve, article two of this chapter shall apply to such license.

Section 2. License Prerequisite to Negotiating Contracts.—No person, association or corporation shall sell or offer for sale or deliver within this State any contract, certificate or bond of any person, association or corporation required by this article to obtain a license from the insurance commissioner to transact business in this State until such license has been issued by said insurance commissioner.

Section 3. Deposits to be Made with the Treasurer.—Before a license to transact business in this State shall be issued by the insurance commissioner to any person, association, or corporation, within the purview of section one of this article, the insurance commissioner shall require the applicant to deposit with the state treasurer (in accordance with article five, chapter twelve of this code), in trust, for the benefit of its contract holders, bonds of

the state of West Virginia, or such other bonds, and securities including bonds issued by the West Virginia bridge commission as may be approved by said insurance commissioner, or both, to the aggregate amount of one hundred thousand dollars, and, in addition to such deposit, such person, association or corporation shall maintain at all times a deposit with the state treasurer of bonds and securities approved by the insurance commissioner to an amount equal to the total amount which such person, association or corporation may be liable to pay in cash to the holders of all contracts under the terms thereof at the time of the deposit: Provided, That when, by the laws of any other state, any such person, association or corporation shall have been required to make and shall have made such deposit in such state, equal or greater in amount for the benefit of contract holders in such state, upon the filing of a certificate to such effect from the proper officer in such state with the insurance commissioner of this State, such person, association or corporation shall not be required to make such deposit with the treasurer of this State for the benefit of its contract holders in such other state; and when the laws of any other state require such deposit less in amount, such person, association or corporation shall file a certificate from the proper officer in such state with the insurance commissioner of this state showing the amount of the deposit made, and shall deposit with the treasurer of this state an amount which, together with the deposit made in such other state, shall make up the total amount required by this state to be deposited by such person, association or corporation, and such contract holders in such other state shall not be entitled to the benefit of the securities deposited with the treasurer of this State under this article, except so much of such deposit as may be made to complete the total amount required by this article where the law of any other state requires a lesser amount.

The insurance commissioner may require an independent appraisal, at the expense of the company, of any property on which it holds a mortgage or trust deed or any bond or other investment offered by such company for the purpose of complying with the deposit provisions of this article.

Section 5. Revocation of License on Failure to Make Additional Deposits or Insufficiency of Assets.—On the failure of such person, association or corporation to deposit such additional bonds and securities with the state treasurer when so required by the insurance commissioner, the license to do business in this State shall be revoked by the insurance commissioner. Whenever the insurance commissioner, upon an examination of the affairs of any such person, association or corporation, finds that the liabilities of such person, association or corporation exceed the assets thereof, the insurance commissioner shall suspend the license of such person, association or corporation until he is satisfied that the assets of such person, association or corporation are increased to exceed said liabilities.

Section 10. Authority of Insurance Commissioner; Control of Deposit Where License Revoked.—The insurance commissioner shall have the same authority over every person, association, or corporation engaged in selling annuity contracts, certificates, or bonds, as over insurance companies, and if in his opinion the assets are impaired or such person, association or corporation is not complying with the law, said commissioner shall have authority to revoke the license of such person, association, or corporation to do business in this State, and, if such license is so revoked, the deposit or a sufficient amount of same, shall remain under the authority and control of the insurance commissioner until the total liability of all the contracts, certificates or annuity bonds or contracts issued

by such person, association or corporation in this State is redeemed or settled.

Chapter 46, Acts of 1941 (Michie's 1941 Cumulative Supplement to the West Virginia Code of 1937, Chapter 32, entitled "Speculative Securities and Fraudulent Sales", Article 3, entitled "Registration and Sale of Face-Amount Certificates")

Section 1. Definitions.—For the purposes of this article the term "face-amount certificate" shall mean any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance in consideration of the payment of periodic installments of a stated or determinable amount; or any security which represents a similar obligation on the part of its issuer, the consideration for which is the payment of a single lump sum.

All other terms used herein shall have their respective meanings, as provided in section two, article one of this chapter.

Section 2. When Certificates Exempt from Registration. — Face-amount certificates issued by a person licensed and supervised by the insurance commissioner of this state shall be exempt from registration under the provisions of this article.

Section 3. Restriction on Sale.—No face-amount certificates, except those exempt under the provisions of section two hereof, shall be sold within this state unless such face-amount securities shall have been registered as hereinafter provided.

Section 4. Registration of Certificates.—Face-amount certificates shall be registered hereunder by the filing of

an application with the commissioner by the issuer or by any dealer properly registered under the provisions of section twelve, article one of this chapter: Provided, That the issuer of such certificates is registered under the provisions of an act of Congress entitled "Investment Company Act of 1940." Such application is to be in the form prescribed by the commissioner. With each such application there shall be filed a certified copy of the registration statement which was filed by the issuer of such certificates with the securities and exchange commission pursuant to the provisions of section eight of the said "Investment Company Act of 1940."

The commissioner may require that the applicant file with him such additional data and information respecting the issuer as he shall deem necessary and pertinent to registration hereunder.

The commissioner shall have power and authority to place such conditions, limitations and restrictions on any registration as may be necessary to carry out the purposes of this article.

Section 5. Fees for Registration.—At the time of filing the application mentioned in section four of this article, the applicant shall pay to the commissioner a fee of one-twentieth of one per cent. of the aggregate face-amount of the certificates to be sold in this state for which the applicant is seeking registration, but in no case shall such fee be less than twenty-five dollars, nor more than three hundred dollars.

Section 6. Expiration of Registration; Reregistration.—Every registration under this article shall expire on the thirtieth day of June in each year. New registrations for the succeeding year shall be issued upon written application, the applicant furnishing the commissioner, upon request, information as hereinbefore provided, and pay-

ing the commissioner a fee on the basis specified in section five of this article on the aggregate face-amount of the certificates to be sold in this state within the year to be authorized by registration. Applications for renewal registration must be made not less than thirty days before the first day of the ensuing registration year, otherwise they shall be treated as original applications.

Section 7. Nonresident Issuer to File with Application for Registration Written Appointment of State Auditor as Attorney in Fact; Service and Acceptance of Process.—When any issuer of face-amount certificates shall not be domiciled in this state, he shall file with every application for registration hereunder (whether such application be made by the issuer in person or by or through a registered dealer) his irrevocable written appointment of the state auditor, or his successor in office, to be his true and lawful attorney in fact, who may accept or upon whom may be served, any lawful process or pleading in any action or proceeding against him in any court of record in this state, and such filing shall constitute his consent that any such process or pleading against him, which is properly served upon the state auditor or is accepted by the state auditor, shall be of the same legal force and validity as process or pleading duly served upon said issuer in this state. In case any process or pleading is served upon the state auditor, or accepted by him, such service shall be made in duplicate, one copy of which shall be filed in the office of the state auditor and the other immediately forwarded by registered mail to the principal office of the issuer against whom such process or pleading is directed.

Section 8. Sales to Be Made Only by Registered Dealers.—Face-amount certificates shall be offered for sale and sold in this state only by dealers and salesmen regis-

tered with the commissioner under the provisions of section twelve, article one of this chapter.

Section 9. Violations; Penalties.—Any person subject to the provisions of this article, who shall sell or offer for sale any face-amount certificates within this state without complying with the provisions of this article, or who continues to sell or offer for sale any such certificates after his registration has expired, or has been revoked or suspended by the commissioner, or who shall otherwise neglect or refuse to comply with any of the provisions of this article, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the penitentiary for not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 10. Applicability of Sections.—Sections three, four, six, nine, and twenty-seven, article one of this chapter, shall not apply to this article. All other sections of this chapter shall apply fully to this article.

Section 11. Provisions Severable.—If any part or section of this act shall be declared unconstitutional or invalid by any court, such declaration shall not affect any other part or section hereof.

Section 12. Article Nine, Chapter Thirty-three, Repealed.—Article nine, chapter thirty-three of the code of West Virginia, one thousand nine hundred thirty-one, is hereby expressly repealed.

CHARTER POWERS OF FIDELITY ASSURANCE ASSOCIATION UNDER 1912 AMENDMENT

III. The objects and purposes for which this Corporation is formed are as follows:

To purchase, acquire, buy, sell, own, hold, dispose of and deal in stock, bonds, mortgages, debentures, obligations, and other securities of corporations and persons for its own account and for others on commission; to loan money on real estate security; to loan money on personal and other security; to acquire, own, deal in and sell real estate, to erect houses thereon, rent and sell the same, to lay out real estate into divisions and lots and to sell and dispose of same; to deal in real estate and to buy, sell and exchange the same for others for a commission or reward; to underwrite in whole or in part any issue of stocks, bonds or other securities; to transact as agents on commission the general business of real estate and insurance in all its branches; to transact on commission the general business of a fiscal agent; to transact any other business incident to any of the above named enterprises which a person, firm or partnership might engage in or do.

To carry on, by purchasing existing businesses, or otherwise, the business of soliciting or receiving deposits or payments on any annuity contracts, certificates or annuity bonds; in fixed and stipulated instalments or otherwise; to acquire and sell and offer for sale or delivery any contract, certificate or bond, of any person, association or corporation, now or hereafter engaged in this state in the business of soliciting, or receiving deposits or payments of any kind of annuity contracts, certificates or annuity bonds; and further to engage in the business of placing or selling certificates, bonds, debentures, certificates of interest, or investment securities of any kind on the partial payment, instalment, or any other

plan of payment, and providing for the sale, redemption, or retiring of the same or any part thereof; and generally to carry on all lawful business necessary or incidental to all or any of the above mentioned objects.

The designation of any one of the objects and purposes aforesaid is not intended and shall not be taken to be a limitation or qualification upon any other of the said designated objects and purposes.